Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ARACELIS RODRIGUEZ,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit ("Federal Circuit"), pursuant to *Karnas v. Derwinski*, 1 Vet.App. 308, 312 (1991), is required to provide a claimant with judicial review utilizing the more favorable version of the law if the law changes after a claim has been filed but before the judicial process has concluded.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit is published as 189 F.3d 1351 (1999) and reprinted in the Appendix ("App.") at App. 1. The Opinion of the Court of Veterans Appeals in *Rodriguez v. West* is an unpublished opinion cited as No. 96-249, 1998 WL 136917 (Vet.App. March 13, 1998) and reprinted at App. 11.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on August 25, 1999 and Rehearing *En Banc* was declined on November 1, 1999.

PROVISIONS INVOLVED

38 C.F.R. § 3.155. Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a

Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one (1) year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a service organization, an attorney, or agent may not be accepted as an informal claim if a power of attorney was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of Sec. 3.151 or Sec. 3.152, an informal request for increase or reopening will be accepted as a claim.

STATEMENT OF THE CASE

The Petitioner is the wife of an Army veteran who served from 1951 to 1953. In August 1979, following the veteran's death, the Petitioner filed a claim for a surviving spouse's pension with the Veteran Administration's Regional Office in San Juan, Puerto Rico. In 1980, the Regional Office found the Petitioner entitled to a surviving spouse pension, but denied the payment of benefits because the Petitioner and her minor daughter were receiving an amount of Social Security benefits that exceeded the permissible maximum under the Veteran Administration pension provisions.

In 1986, the Petitioner received a notice from the Social Security Administration that her Social Security benefits would terminate when daughter turned sixteen in February 1987, but that her daughter's Social Security benefits would continue until the daughter turned eighteen. Consequently, after her daughter's sixteenth birthday, the Petitioner visited the San Juan Regional Office, showed them the Social Security Administration letter and requested the surviving spouse's pension. The Petitioner was orally informed by a Regional Office employee that she would still not be entitled to the surviving spouse's pension since her daughter would continue to receive the Social Security benefits until she turned eighteen. This information turned out to be incorrect. The Petitioner returned to the Regional Office four times, requesting the surviving spouse pension, and was provided this same information each time.

In March 1990, the Petitioner filed a written application for a pension with the Veterans Administration's Chicago Regional Office, which was then forwarded to the San Juan Regional Office. Consequently, the San Juan Regional Office authorized payments to be made to her for her surviving spouse pension benefits effective April 1, 1990. The Petitioner filed a Notice of Disagreement, the method of appealing such a decision, claiming that she should have received the surviving spouse pension as of February 1987, the date she first requested such benefits from the San Juan Regional Office. After a hearing, the San Juan Regional Office held that since the Petitioner had not filed a written claim for benefits prior to March 1990, she was not entitled to an earlier effective date for the surviving spouse pension benefits.

The Petitioner appealed this decision and the Board of Veterans' Appeals affirmed the Regional Office decision on the grounds that there was no written communication requesting the surviving spouse pension until March 1990. The Board of Veterans' Appeals further found that the 1986 Social Security Administration letter would not suffice as a written communication since it did not contain any language evidencing Petitioner's belief in entitlement to benefits.

On appeal to the Court of Appeals for Veteran Claims ("CAVC"), the Petitioner claimed that pursuant to 38 C.F.R. § 3.155, she had filed an informal claim for a surviving spouse pension by making an oral request for the benefits at the San Juan Regional Office. The CAVC, in rejecting such an argument, determined that an informal claim, as provided in 38 C.F.R. § 3.155 referred to a claim "in writing" as defined by 38 C.F.R. § 3.1(p).

On appeal to the Federal Circuit, the Petitioner argued that the plain language of 38 C.F.R. § 3.155(a) did not provide a "written" requirement. Petitioner further argued that 38 C.F.R. § 3.1(p) was a "general" regulation and that it should not be considered in construing the "specific" provisions of 38 C.F.R. § 3.155(a).

On June 22, 1999, after oral argument, but prior to the Federal Circuit's decision, Petitioner's attorney submitted the additional authority of a CAVC decision, *Norris v. West*, 12 Vet.App. 413 (1999), which was decided on June 9, 1999. In *Norris*, the CAVC held that pursuant to 38 C.F.R. § 3.155(c), the Secretary must accept an informal **request** as a "claim". As such, Petitioner claimed that *Norris* supported her construction of 38 C.F.R. § 3.155(a),

in that there was no "written" requirement, but that an oral request could constitute a claim for purposes of the regulation.

The Federal Circuit issued its opinion on August 25, 1999 and affirmed the CAVC's decision below. The Federal Circuit's opinion failed to address the *Norris* case or the construction of 38 C.F.R. § 3.155(a) in light of 38 C.F.R. § 3.155(c). Consequently, Petitioner filed a Petition for Panel Rehearing and Rehearing *En Banc*, claiming that the Federal Circuit should have construed 38 C.F.R. § 3.155(a) in light of 38 C.F.R. § 3.155(c) and *Norris v. West*. The Federal Circuit denied the petition on November 1, 1999.

REASONS FOR GRANTING THE WRIT

This case provides the Court with an opportunity to provide definitive guidance to the Federal Circuit regarding the role of the Federal Circuit in the judicial review process of the veteran benefits adjudication system. The Petitioner asserts that the Federal Circuit must apply the *Karnas Doctrine* as adopted by the CAVC. As this Court is well aware, the field of veteran benefits adjudication is a unique system in which the veteran is afforded many statutory, regulatory and case law advantages, not only in the adjudication of his claim, but in the judicial review of benefit entitlement as well. These statutory, regulatory and case law advantages that operate to assist the veteran and his dependents are relatively new and appear to suffer from both Agency and judicial reluctance to fully embrace and employ such advantages to the veteran's benefit.

Until 1988, when Congress enacted the Veterans' Judicial Review Act, the Veterans Administration stood in "splendid isolation as the single federal administrative agency whose major functions were explicitly isolated from judicial review." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5791. When the 1988 Act was finally passed, the final legislation contained five crucial components: previous preclusion of judicial review of veteran benefit entitlements was repealed; the United States Court of Veterans Appeals (now called the Court of Appeals for Veteran Claims or "CAVC") was created; the Board of Veterans' Appeals (BVA) was retained as the final administrative decisional body with the Department of Veterans Affairs; a $10 attorney's fee cap was abolished; and most importantly for the issues discussed in this writ, an additional level of judicial review was created by allowing review of CAVC decisions by the Federal Circuit on certain narrow issues of law. *See*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

The Federal Circuit has a **limited** but vital role in judicial review of veterans' claims. Pursuant to its statutory jurisdiction, as provided in 38 U.S.C. § 7292, parties who are dissatisfied with a CAVC decision have a statutory right to take an appeal to the Federal Circuit. However, as a statistical matter, substantial appellate review for most cases ends at the CAVC. Since 1990, the CAVC has disposed of over 10,000 cases. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). In comparison, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *Id.* One reason for the relatively small number of cases

decided by the Federal Circuit on the merits is due to the Federal Circuit's limited jurisdiction. The Federal Circuit "has **exclusive** jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." *See*, 38 U.S.C. § 7292(c) (emphasis added). CAVC factual determinations are insulated from Federal Circuit review, unless the facts implicate constitutional questions. *See*, 38 U.S.C. § 7292(d)(2). If appeal to the Federal Circuit does not raise constitutional question, question as to interpretation of constitutional, statutory or regulatory provision or a question as to a regulation's validity relied upon by the CAVC, the Court is required to dismiss the appeal for lack of jurisdiction. *See, Albun v. Brown*, 9 F.3d 1528 (Fed. Cir. 1992).

Beyond Federal Circuit review, dissatisfied parties may petition the Supreme Court for writ of certiorari. However, in the ten years that the CAVC has been in existence, the Supreme Court has granted only one certiorari petition, *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving large implications for the CAVC and Federal Circuit regarding the proper canons of construction for statutory and regulatory review. Thus, in all practicality to date, a veteran's last opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the Federal Circuit's role in statutory and regulatory interpretation is essential to ensure the veteran's statutory right to judicial review of CAVC.

As stated *supra*, the Federal Circuit is vested with limited authority to review CAVC decisions on pure questions of law. *See*, 38 U.S.C. § 7292, *Smith v. Brown*, 35 F.3d 1516, 1517 (1993). This statutory authority "**commands** that this Court (Federal Circuit) **shall** decide all relevant questions of law" and set aside any questions of statutory or regulatory interpretation that are not lawful. *Id.*, (emphasis added).

One of the unique "advantages" provided to a veteran in judicial review of benefits adjudication is implicated in the construction of veteran benefits statutes and regulations. This Court, in *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221 (1991) held that veteran benefits statutes must be interpreted in favor of the veteran and against the government. This holding was expressly affirmed and used as support for this Court's holding in *Gardner v. Brown*, 513 U.S. 115 (1994), when this Court determined that the government's interpretation of 38 U.S.C. § 1151 was without merit. This Court has further held that veteran statutes must be **liberally construed** for the benefit of veterans. *See, Coffey v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (emphasis added), *citing, Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278 (1946). Clearly, this Court's holdings are premised on Congress' intent to create a uniquely benevolent statutory scheme in which veterans are afforded all benefit of the doubt. *See, Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

Another unique advantage provided to veterans in the judicial review of their claims is the judicially created rule in *Karnas v. Derwinski*, 1 Vet.App. 380, 313 (1991), that if the state of veteran benefits law changes after a claim has been filed or reopened **but before the administrative**

or judicial appeals process has been concluded, the version most favorable to the Petitioner must be utilized. Meaning, that as long as a veteran's claim is pending in the judicial review process, the veteran is entitled to the most favorable version of the law available to him.

These rules of judicial review further establish the vitality of the Federal Circuit's jurisdictional responsibilities. Meaning, that for years, veterans were denied the right to judicial review of VA determinations. In essence, the VA was allowed to dictate statutory interpretation without the oversight afforded by judicial review. In 1988, Congress determined that the VA would be no longer entitled to enjoy the era of splendid isolation and created the CAVC to entertain questions of application of law to fact. To further ensure that the veteran was afforded utmost protection when it came to issues of statutory and regulatory interpretation, Congress mandated that the Federal Circuit review CAVC decisions limited to constitutional questions and issues of statutory and regulatory interpretation. Additionally, this Court has recognized the intent of Congress as requiring that veteran benefit statutes be interpreted in the veteran's favor. Such a requirement is vital in light of the VA's historical freedom from judicial review.

Thus, the Federal Circuit performs two very important functions. First, it acts to provide statutory and regulatory interpretation. Second, the Federal Circuit ensures that the veteran is provided every unique advantage afforded to him in the process of dispensing judicial review.

In the present case, the Federal Circuit clearly failed to fulfill its necessary function of providing regulatory interpretation while affording the claimant every unique advantage while dispensing judicial review. In the present case, the Federal Circuit was faced with an issue of regulatory interpretation. Specifically, whether 38 C.F.R. § 3.155(a) required a claimant to submit a "written" request for benefits. Prior to the Federal Circuit issuing an interpretation of the regulation, the CAVC issued its opinion in *Norris, supra.* In *Norris,* the CAVC provided a dispositive interpretation of the regulation which was a "more favorable" interpretation than the interpretation afforded the Petitioner in the prior proceedings before both the Agency and the Courts. This dispositive interpretation in a precedential opinion by the CAVC, in *Norris,* during the pendency of the Petitioner's Appeal, required under the *"Karnas Doctrine"* that the decisions of both the CAVC and the Federal Circuit in this matter be vacated and remanded for application of the "more favorable" interpretation. As stated *supra,* in *Norris,* the CAVC held that pursuant to 38 C.F.R. § 3.155(c), the Veteran Administration must accept an informal **request** as a "claim". Specifically, the CAVC held:

> The Secretary cannot require the veteran to take any additional action in order to perfect that "claim" – as contrasted with an informal claim under 38 C.F.R. § 3.155(a), which would be applicable in a situation where the veteran had not previously filed a claim that met the "requirements of § 3.151 or § 3.152". Thus, the only real benefit to a claimant that paragraph (c) provides is that the claimant need not file another formal application for benefits as called

> for in § 3.155(a), i.e., need not start the process anew, in order to obtain an increase if he or she has already filed a formal claim pursuant to 38 C.F.R. § 3.151 or 3.152.

Norris, 12 Vet.App. at 421. Thus, *Norris* specifically holds that if a veteran has previously filed a "claim" and thereafter seeks to reopen or obtain an increase, that the veteran need do nothing more than make an "informal request" and that such an "informal request" constitutes a claim as anticipated by 38 C.F.R. § 3.155(a).

In the present case, the Petitioner had previously filed a claim which met the requirements of 38 C.F.R. § 3.152 in August 1979, for eligibility for surviving spouse pension, but could not receive payment of those benefits because of her then income. The entitlement to the payment of benefits was denied based upon her income, but the eligibility based upon a change in that income remained open and subject to readjudication based upon a change in her income. Consequently, in March 1987, the Petitioner submitted an "informal request" that her claim be reopened. Pursuant to 38 C.F.R. § 3.155(c) and the *Norris* holding, the Petitioner's "informal request" was required to be accepted as a "claim" under 38 C.F.R. § 3.155(a).

Even more importantly, pursuant to the CAVC's holding in *Karnas*, the Federal Circuit was required to provide the Petitioner with the benefit of the change of law as found in *Karnas*. However, the Federal Circuit, in issuing its opinion failed to mention, much less analyze, the CAVC's holding in *Norris* and its effect on the interpretation of 38 C.F.R. § 3.155(a).

The Federal Circuit's failure has a wide reaching effect because it dispenses with Congressional mandate for the Federal Circuit's relationship to veteran benefits law and undermines Congressional intent in creating this "uniquely benevolent" adjudication system. As such, it is imperative for this Court to clarify to the Federal Circuit its obligation to apply the *Karnas Doctrine* as created by the CAVC in order to ensure that all the unique statutory and case law advantage relating to judicial review are afforded to veterans as Congress intended.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

98-7087

ARACELIS RODRIGUEZ,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: AUGUST 25, 1999

Before PLAGER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

The primary issue in this appeal is whether the Court of Veterans Appeals (the name of which was changed to the Court of Appeals for Veterans Claims on March 1, 1999) correctly held that an informal claim for benefits filed with the Department of Veterans Affairs (Department) must be in writing. We affirm.

I

The appellant Rodriguez's deceased husband served in the Army from 1951 to 1953. In August 1979, following his death, Rodriguez filed with the Department's regional office in San Juan, Puerto Rico an application for a surviving spouse's pension. In 1980 the regional office denied the claim because Social Security benefits that

Rodriguez and her daughter were receiving exceeded the permissible maximum under the pension provisions. Rodriguez did not appeal that decision.

Rodriguez asserts that in 1986 she received a notice from the Social Security Administration stating that her Social Security benefits would terminate when her daughter turned sixteen in February 1987, but that her daughter's would continue until the daughter became eighteen. She states that after her daughter's birthday, she visited the Department's San Juan regional office, showed them the letter and requested a surviving spouse's pension, but was told she was not entitled to it because, despite the termination of her Social Security benefits, her daughter would continue to receive them. She further states that she returned to the San Juan office four times, and received the same information.

In March 1990 Rodriguez filed a written application for a pension with the Department's Chicago regional office, which forwarded it to the San Juan office. The latter office awarded her a pension effective April 1, 1990. She filed a notice of disagreement (the method for appealing such a decision), alleging that the effective date of her benefits should have been February 1987, when her Social Security benefits ended and she visited the San Juan office to ask about a surviving spouse's pension. After a hearing, the hearing officer in the San Juan regional office held that since there was no evidence that Rodriguez had filed a written claim for benefits before 1990, April 1, 1990 was the proper effective date for her benefits.

The Board of Veterans Appeals affirmed on the ground that "the record does not show that [Rodriguez] filed a reopened claim until March 1990." The Court of Veterans Appeals, in a single-judge decision, affirmed, and a three-judge panel, with a partial dissent, denied review of that decision. The court held that "[t]here is no evidence in the record that prior to March 1990, Rodriguez submitted a written communication that expressed her intent to apply for benefits" – the court ruled that the letter from the Social Security Administration, the only writing Rodriguez allegedly presented, would not suffice as a written claim because it "would not contain language expressing [Rodriguez's] belief in entitlement to benefits." The court also rejected Rodriguez's claim that the Secretary violated his statutory duty under 38 U.S.C. § 5102 and § 7702(d) by failing to provide her with "aid and assistance," based on his failure to provide her with an application form for filing a claim in 1987 and failing to help her prepare and file that claim.

II

A. The jurisdiction of this court over appeals from the Court of Veterans Appeals is limited "to review[ing] and decid[ing] any challenge to the validity of any statute or regulation or any interpretation thereof" "that was relied on by the Court in making the decision." 38 U.S.C. § 7292(c), (a) (1994). Conversely, Section 7292(d)(2) states:

> Except to the extent that an appeal . . . presents a constitutional issue, the Court of Appeals may

> not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

In his brief the Secretary argued that we lack jurisdiction over this appeal "[b]ecause Ms. Rodriguez's appeal challenges only the application by the CVA to the facts of her case." At oral argument, however, he retreated from this position and acknowledged that we have jurisdiction insofar as Rodriguez contends that under the Department's regulations an informal claim need not be in writing.

The Secretary's retreat was well advised. Whether the regulations require that an informal claim be written involves the interpretation of the regulation, not the application of the regulation to the particular facts here. We therefore have jurisdiction over that issue. As we explain below, however, some of Rodriguez's other contentions do involve the application of the statutes and regulations to the facts here and we therefore have no jurisdiction to adjudicate them.

B. The statute governing veterans benefits provides that "[a] specific claim in the form prescribed by [the Secretary of Veterans Affairs] . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the [Secretary]." 38 U.S.C. § 3001(a) (1982) (current version at *id.* § 5101(a)). The statute further provides that "[u]nless specifically provided otherwise in this chapter, the effective date of an award . . . shall not be earlier than the date of receipt of application therefor." *Id.* § 3010(a) (renumbered *id.* § 5110(a)).

In the definition section of the regulations the Secretary has defined "claim" and "application" (which the statute does not define) as follows:

> "Claim"-"Application" means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit.

38 C.F.R. § 3.1(p) (1987). The Secretary has adopted a form providing specified information that must be filed as a formal claim to obtain benefits. *See id.* §§ 3.152, 3.153. The Secretary's regulations also state the following with respect to informal claims:

> Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the [Department of Veterans Affairs], from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of the informal claim.

Id. § 3.155(a).

These statutory and regulatory provisions establish the requirements and procedures for seeking veterans' benefits. To be considered a "claim" or "application" for benefits, the claim, whether "formal" or "informal," must

be "in writing." *Id.* § 3.1(p). The applicant must eventually file a form providing specified information that the Secretary has adopted, which constitutes the formal claim. *See id.* §§ 3.152, 3.153. In addition, however, "[a]ny communication or action, indicating an intent to apply for . . . [veterans] benefits . . . may be considered an informal claim," for which "an application form will be forwarded to the claimant for execution." *Id.* § 3.155(a).

Rodriguez contends that because Section 3.155(a) refers to "[a]ny communication or action" but does not state that it must be written, the provision allows informal oral claims; that that regulation's authorization of such claims conflicts with Section 3.1(p), which requires that both formal and informal claims be "in writing"; and that since the latter regulation is general (dealing with all claims) but the former regulation is specific (dealing only with informal claims), we should apply the established canon of statutory construction that where a specific and a general statute conflict, the specific prevails over the general.

The basic flaw in this argument is that the absence of the word "written" in Section 3.155(a) does not establish that that provision covers oral informal claims. That word was unnecessary because Section 3.1(p) defines "claim," informal as well as formal, as a "communication in writing." When Section 3.155(a) refers to "an informal claim," it necessarily incorporates the definition of that term in Section 3.1(p) as a "communication in writing." In other words, the various provisions of Section 3.155(a) dealing with informal claims necessarily relate to written claims. The section does not deal with or authorize oral informal claims.

Although Section 3.155(a) does not permit informal non-written claims, that does not make that provision insignificant or surplusage, as Rodriguez argues. To the contrary, the regulation has the important function of making clear that there is no set form that an informal written claim must take. All that is required is that the communication "indicat[e] an intent to apply for one or more benefits under the laws administered by the Department," and "identify the benefits sought."

Our conclusion is supported not only by the language and structure of the regulations, but also by practical considerations. A large number of claims are filed with the Department, and without written evidence of them, it would be extremely difficult, if not impossible, to determine exactly when an informal claim was filed and what benefits were sought. The filing date is critical because under the statute, the effective date of an award cannot be earlier than the date of the filing of the application.

To permit an oral statement to constitute the filing of an informal claim would create serious problems in the operation of the veterans benefits programs. It would often be impossible for the Department's personnel who handle and process these claims to recollect many of the oral applications made, let alone the details of those claims. As our predecessor court stated, in holding that an informal claim for a tax refund must be written:

> It is common knowledge that the personnel in governmental departments is constantly changing. Many times several different employees work on a single case. Some of them have before them only such information as is contained in

> the files. For this reason, and because of the shortness of the memory of man, and for many other reasons, only a written claim is sufficient to meet the requirements of the statute and the need it intended to fill.

Wrightsman Petroleum Co. v. United States, 35 F. Supp. 86, 96 (Ct. Cl. 1940) (citation omitted).

The same reasoning applies to the filing of informal claims for veterans benefits.

In sum, the Court of Veterans Appeals correctly held that under the Department's regulations an informal claim application must be written.

B. Rodriguez argues that if an informal claim application must be in writing, the written notice from the Social Security Administration that she submitted to the Department's Puerto Rican regional office in 1987 satisfied the requirement. That argument, however, involves only the application of the regulation to the particular facts of her case, not the interpretation of the regulation itself. We therefore have no jurisdiction to consider that argument.

C. Rodriguez makes several other arguments relating to these provisions, including the claim that the Secretary should be equitably estopped from denying benefits for the period 1987 to 1990. She also argues that the Department improperly failed to reopen her 1980 claim when she submitted the notice from the Social Security Administration in 1987. She asserts that this was "new and material evidence" under 38 U.S.C. § 5108, which provides for reopening in that situation. We need not discuss these contentions, however, because they

involve not the interpretation of the statutory provisions, but their application to the particular facts of this case. That is an issue beyond our jurisdiction.

D. Two provisions of Title 38 of the United States Code require the Secretary to assist applicants in filing claims. Section 5102 states:

> Upon request made in person or in writing by any person claiming or applying for benefits under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such claim.

Section 7722(d) states:

> The Secretary shall provide, to the maximum extent possible, aid and assistance (including personal interviews) to members of the Armed Forces, veterans, and eligible dependents with respect to subsections (b) and (c) [of section 7722] and in the preparation and presentation of claims under laws administered by the Department.

Rodriguez contends that the Secretary violated those provisions by failing to provide her with a formal claim form and to assist her in executing it when she visited the Puerto Rican regional office in 1987 to seek benefits. She contends that the appropriate remedy for the Secretary's failure to satisfy his obligation at that time is to give her 1990 formal application an effective date of 1987.

To the extent that Rodriguez's argument is that her 1987 submissions to the regional office triggered the Secretary's obligation to assist her, it involves the application

of the statutory provisions to the particular facts, and therefore is beyond our jurisdiction. The other aspects of her argument, however, involve the interpretation of those statutes.

It is doubtful whether these two provisions create any enforceable rights for an applicant for benefits who did not receive assistance in presenting a claim. Neither provision prescribes any remedy for breach. The provisions appear to be hortatory rather than to impose enforceable legal obligations upon the Secretary.

In any event, nothing in those provisions indicates, or even suggests, that the Secretary's failure to provide assistance to a claimant justifies ignoring the unequivocal command in 38 U.S.C. § 5110(a) that the effective date of benefits cannot be earlier than the filing of an application therefor. *See Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1559 (Fed. Cir. 1993) ("the specific substantive section in issue here . . . surely trump[s] other general goals of the overall statute to the extent that they are arguably inconsistent, particularly where the general goals are stated only in general, introductory and hortatory language"). Rodriguez did not file a formal or informal application until 1990, and under the statute that – and not an earlier date at which the Secretary allegedly failed to provide her assistance in filing her claim – is the effective date of her benefits.

CONCLUSION

The judgment of the Court of Veterans Appeals is

AFFIRMED.

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS
No. 96-249

ARACELIS RODRIGUEZ, APPELLANT,

V.

TOGO D. WEST, JR.,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HOLDAWAY, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i) this action may not be cited as precedent.

HOLDAWAY, *Judge*: The Appellant, Aracelis Rodriguez, appeals a March 1996 decision of the Board of Veterans' Appeals (BVA or Board) which determined that the appellant was not entitled to an effective date before April 1, 1990, for payment of death pension benefits. The Court has jurisdiction of the case under 38 U.S.C. § 7252(a). For the following reasons, the Court will affirm the decision of the Board.

I. FACTS

The veteran served on active duty in the United States Army from April 1951 to April 1953. He died in August 1979. At that time, the appellant filed an application for VA death pension benefits with a VA regional office (VARO). The VARO denied the appellant's claim because she and her minor daughter received Social Security benefits in excess of the VA income limits for death pension purposes. In December 1986, the Social Security Administration (SSA) informed the appellant that her

Social Security benefits would be terminated when her daughter reached the age of majority in February 1987. In March 1987, the appellant stopped receiving Social Security benefits.

In March 1990, the appellant filed an application to reopen her claim for death pension benefits. The VARO informed the appellant in July 1990 that her claim had been denied because the VARO lacked evidence that the veteran's prior marriage had been terminated. In January 1991, the appellant filed a Notice of Disagreement (NOD). A June 1991 letter from the VARO indicated that the appellant's claim had been reconsidered and that she had been granted pension benefits effective April 3, 1990. The appellant timely filed an NOD claiming that the effective date of her award should have been February 1987. In April 1993, the VARO issued a Statement of the Case, and the appellant timely filed a substantive appeal to the BVA.

In June 1993, the appellant testified before a VA hearing officer. The appellant was represented by Mr. Roberto Ortiz from the Office of Puerto Rico Public Advocate for Veterans Affairs. The appellant testified that she initially visited the VA contact office at the time she stopped receiving Social Security benefits as the guardian of her daughter. She stated that she presented the SSA letter to an employee at the VA contact office and told her that the SSA had stopped sending her payments. The appellant explained that the VA employee asked her if her daughter was still receiving payments, and she informed the VA employee that her daughter received payments of approximately three hundred dollars. The appellant claimed that the VA employee then informed

her that she was not eligible for death pension benefits, and the appellant left the contact office. The appellant also explained that she had returned to the contact office four times and received the same response each time. At the end of the hearing, Mr. Ortiz testified that from his experience, he had learned of other instances similar to the appellant's. He stated that employees at the contact office were preadjudicating claims by telling the claimants, without any explanation, that they were not entitled to benefits. Mr. Ortiz argued that the VARO had prevented the appellant from filing a formal claim in 1987 by improperly preadjudicating her claim. In July 1993, the hearing officer denied the appellant's claim for an earlier effective date.

On appeal to the BVA, the Board found that the earliest evidence of a claim to reopen was in March 1990, and therefore, payment of the appellant's award of pension benefits could not begin prior to April 1, 1990.

II. ANALYSIS

A BVA determination of an effective date for an award of pension benefits is a finding of fact which the Court reviews under the "clearly erroneous" standard of review. *See Stewart v. Brown*, 10 Vet.App. 15, 17 (1997); *Mindelhall v. Brown*, 7 Vet.App. 271, 275 (1994). A finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). "[T]his Court is not permitted to substitute its judgment for that of the BVA on issues of

material fact; if there is a 'plausible' basis in the record for the factual determinations of the BVA, [the Court] cannot overturn them." *Id.* at 53. Pursuant to 38 U.S.C. § 5110(a), the effective date of an award of pension benefits based on a claim reopened after a final adjudication "shall not be earlier than the date of receipt of application therefore." The payment of monetary benefits based on an award of pension begins the first day of the calendar month following the month in which the award became effective. *See* 38 C.F.R. § 3.31 (1997). Additionally, 38 U.S.C. § 5101(a) states that "[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." "Section 5101(a) is a clause of general applicability and mandates that a claim must be filed in order for any type of benefit to accrue or be paid. " *Jones v. West*, ___ F.3d ___, ___, No. 96-7041, slip op. at 6 (Feb. 13, 1998). The appellant filed a formal application for a reopening of her claim in March 1990. Therefore, the Board's determination that April 1, 1990, was the appropriate date to start payments of the appellant's pension benefits had a plausible basis in the record. The appellant, however, contends that the Board decision should be reversed because she had previously filed an informal claim and because the Secretary breached his duty of "aid and assistance" under 38 U.S.C. § 7722(d).

A. Informal Claim

The appellant claims that she filed an informal claim and around March 1987 by presenting the SSA letter to an employee at the VA contact office and that VA's alleged

breach of its duty of "aid and assistance" tolled the period for the appellant to file her formal claim. However, "claim" or "application" is defined by regulation as "a formal or informal communication *in writing* requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (1997) (emphasis added). There is no evidence in the record that prior to March 1990, the appellant submitted a written communication that expressed her intent to apply for benefits. In cases where this Court has tolled the time period for filing a formal application because VA failed to provide an application form to the claimant, there was a written document of record that satisfied the regulatory requirements for an informal claim. *See Hamilton v. Brown*, 4 Vet.App. 528, 544-45 (1993); *Servello v. Derwinski*, 3 Vet.App. 196, 200 (1992); *Quarles v. Derwinski*, 3 Vet.App. 129, 137 (1992). therefore, none of the appellant's visits to the VA contact office constituted an informal claim because any intent to apply for or belief in entitlement to VA benefits was expressed orally. The letter from the SSA would not contain language expressing the appellant's belief in entitlement to benefits.

B. Breach of Duty of "Aid and Assistance"

The appellant also claims that the Secretary's alleged breach of his duty of "aid and assistance" was reversible error. Pursuant to 38 U.S.C. § 7722(d), the Secretary must "provide, to the maximum extent possible, aid and assistance . . . to . . . eligible dependents . . . in the preparation and presentation of claims under the laws administered by the Department." Additionally, pursuant to 38 U.S.C.

§ 5102, "[u]pon request made in person or in writing by any person claiming or applying for benefits under the laws administered by the Secretary, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such a claim." Even assuming the Secretary breached his duty, the appellant has not pointed to an available remedy for the breach. A remand to require the Secretary to provide the appellant with proper aid and assistance would be pointless because the Secretary did subsequently provide the appellant with an application form, assist her in filing it, and award the appellant pension benefits. In *Smith v. Derwinski*, 2 Vet.App. 429 (1992), the Court stated in dicta that the one-year time limit under 38 U.S.C. § 5110(b)(3)(B), for applying for retroactive benefits when a veteran becomes totally disabled, could be tolled if VA failed to inform the appellant of the need to apply within one year. However, unlike the *Smith* case, there is no statutory time period for filing a claim to reopen that could be tolled. *See* 38 U.S.C. §§ 5108, 5110(a). The remedy for a breach of the Secretary's obligations to provide assistance in preparing claims "cannot involve payment of benefits where the statutory eligibility requirements for those benefits are not met." *Harvey v. Brown*, 6 Vet.App. 416 (1994). "[T]he payment of government benefits must be authorized by statute; therefore, erroneous advice given by a government employee cannot be used to estop the government from denying benefits." *McTighe v. Brown*, 7 Vet.App. 29, 31 (1994) (citing *OPM v. Richmond*, 496 U.S. 414, 424 (1990). By statute, an application for pension benefits, in the form prescribed by the Secretary, must be filed in order or benefits to be

paid. *See* 38 U.S.C. § 5101; *Jones, supra.* Because the appellant did not file an application for a reopening of her claim prior to March 1990, there is no legal basis for an award of pension benefits prior to April 1, 1990. The BVA's determination was correct and will be affirmed.

III. CONCLUSION

After consideration of the pleadings and a review of the record, the Court holds that the appellant has not demonstrated that the BVA committed either legal or factual error which would warrant reversal or remand. The Court is also satisfied that the BVA decision fulfills the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1), and the benefit of the doubt doctrine of 38 U.S.C. § 5107(b). *See Gilbert v. Derwinski,* 1 Vet.App. 49 (1990). Summary disposition is appropriate. *See Frankel v. Derwinski,* 1 Vet.App. 23 (1990).

The the decision of the Board is summarily AFFIRMED.

DATED: MAR 13 1998

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United States Court of Appeals for the Federal Circuit

98-7087

ARACELIS RODRIGUEZ,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 8, 1999.

FOR THE COURT,
/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: November 1, 1999

cc: Kenneth M. Carpenter
Todd M. Hughes

(Filed Nov. 1, 1999)
JAN HORBALY
CLERK

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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App. 20

98-7087

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ARACELIS RODRIGUEZ
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
Secretary of Veteran Affairs,
Respondent-Appellee.

APPEAL FROM UNITED STATES
COURT OF APPEALS FOR
VETERANS CLAIMS IN 96-249
JUDGE RONALD M. HOLDAWAY

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC AND APPENDIX

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October 4, 1999

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimant-Appellant Aracelis Rodriguez certifies the following:

1. The full name of every party or amicus represented by me is:

   Aracelis Rodriguez

2. The name of the real party in interest represented by me is:

   None

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance because the issue decided by the CAVC in *Norris v. West*, 12 Vet.App. 413 (1999). The *Norris* opinion by the CAVC was submitted to the Panel following oral argument, but was either overlooked or not considered by the Panel in its opinion. The *Norris* decision by the CAVC addresses the relationship between 38 C.F.R. §§ 3.155(a) and 3.155(c). The Panel's decision in this case is flawed due to the lack of consideration of the CAVC's precedential opinion in *Norris*. Additionally, the Panel did not consider the implications of this Court's decision in *Hayre v. West*, ___ F.3d ___, No. 98-7046 (decided August 15, 1999). The decision by this Panel required the consideration of both the

CAVC's decision in *Norris* and the Federal Circuit's decision in *Hayre*. The precedents established in *Norris* and in *Hayre* are in the judgment of Appellant's counsel controlling and dispositive in the instant matter.

/s/ Kenneth M. Carpenter

Kenneth M. Carpenter,
Attorney for Appellant,
Aracelis Rodriguez

98-7087

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ARACELIS RODRIGUEZ,
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Pursuant to Rule 35(d) of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, Aracelis Rodriguez respectfully moves for a panel rehearing, or in the alternative, a rehearing en banc of the August 25, 1999 decision of the Court affirming the U.S. Court of Claims for Veteran Appeals ("CAVC") in the case of *Rodriguez v. West*, 1998 WL 136917, No. 96-249 (Vet.App.).

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that in its August 25, 1999 decision, the Panel misinterpreted 38 C.F.R. § 3.155(a) by failing to construe the regulation in its entirety to include consideration of 38 C.F.R. § 3.155(c). The Appellant further contends that the Panel misinterpreted 38 C.F.R. § 3.155(a) by failing to employ the mandatory canons of construction that apply uniquely to veteran benefits statutes. Lastly, the Appellant claims that the Panel committed legal error by determining that the VA's violation of its statutory and regulatory duty pursuant to 38 U.S.C. § 5102 and 38 C.F.R. § 3.150(a) does not impose any enforceable legal obligation upon the VA.

ARGUMENT

The first issue placed before the Panel was whether the CAVC misinterpreted 38 C.F.R. § 3.155(a). Ms. Rodriguez contended that because § 3.155(a) referred to "**any** communication or action" and did not expressly provide that such communication be in writing, that the provision allowed for informal oral claims. The Panel rejected such an interpretation for three reasons. First, the Panel stated that the absence of the express mention of "written" did not, in and of itself, establish that the provision contemplated oral informal claims. Second, the Panel determined that because 38 C.F.R. § 3.1(p) defines "claim" as a "communication in writing", that 38 C.F.R. § 3.155(a) necessarily incorporated § 3.1(p)'s definition to include a "communication in writing". Finally, the Panel reasoned that their conclusion was also supported by practical reasons since the VA would have no way of

keeping track of claims submitted to the Department without written evidence of such claims. As such, the Panel concluded that 38 C.F.R. § 3.155(a) must be interpreted as requiring an informal application in writing.

The Panel's interpretation of 38 C.F.R. § 3.155(a) is legally incorrect because it failed to read the regulation as a whole. Statutory construction is a holistic endeavor and must, at a minimum, account for the statute's full text, language as well as punctuation, structure and subject matter. *See, U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America., Inc.*, 508 U.S. 439 (1993). Further, the rules of statutory construction are equally applicable to regulatory interpretation. *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994).

In the present case, the Panel erred by failing to construe 38 C.F.R. § 3.155(a) in light of § 3.155(c), which provides; "[w]hen a claim has been filed which meets the requirements of Sec. 3.151 or Sec. 3.152, an **informal request for increase or reopening will be accepted as a claim**." (*Emphasis added*). Clearly, 38 C.F.R. § 3.155(c) provides that when a claimant has previously submitted a claim for either disability benefits (Sec. 3.151) or death benefits (Sec. 3.152), the claimant need only submit an **"informal request"** for an increase or reopening and that such an **informal request** shall be accepted as a claim.

This interpretation of 38 C.F.R. § 3.155(c) was endorsed by the CAVC in *Norris v. West*, 12 Vet.App. 413 (1999), which was submitted by the Appellant as additional authority to the Panel prior to its decision herein. In *Norris*, the veteran claimed that there was CUE in a prior Regional Office determination because the VA failed

to adjudicate a claim for total disability based on individual unemployability (TDIU). The VA claimed that it had no duty to adjudicate such an issue because the veteran had never filed a written application claiming TDIU as required by 38 C.F.R. § 3.155(a).

The CAVC held that pursuant to 38 C.F.R. § 3.155(c), that the Secretary **must** accept an informal request for a rating increase as a "claim". Specifically, the CAVC held:

> the Secretary cannot require the veteran to take any additional action in order to perfect that "claim" – as contrasted with an informal claim under 38 C.F.R. § 3.155(a), which would be applicable in a situation where the veteran had not previously filed a claim that met the "requirements of § 3.151 or § 3.152". Thus, the only real benefit to a claimant that paragraph (c) provides is that the claimant need not file another formal application for benefits as called for in § 3.155(a), i.e., need not start the process anew, in order to obtain an increase if he or she has already filed a formal claim pursuant to 38 C.F.R. §§ 3.151 or 3.152.

Thus, *Norris* specifically holds that if a veteran has previously filed a "claim" and thereafter seeks to reopen or obtain an increase, that the veteran need do nothing more than make an "informal request" and that such an "informal request" constitutes a "claim" as contemplated by 38 C.F.R. § 3.155(a), as interpreted by the CAVC in *Norris*.

In the present case, Ms. Rodriguez had previously filed a claim which met the requirements of § 3.152 in ***August 1979***. That claim was denied. Consequently, in March 1987, Ms. Rodriguez was submitting an "informal request" or "***oral request***" that her claim be reopened.

Pursuant to 38 C.F.R. § 3.155(c), Ms. Rodriguez's "informal/oral request" was required to be accepted as a "claim" under 38 C.F.R. § 3.155(a).

As such, when 38 C.F.R. § 3.155(a) is read in conjunction with § 3.155(c), it is clear that an informal claim need not be made in writing. 38 C.F.R. § 3.155(c) specifically contemplates situations in which an "informal request" **must** be treated as a "claim". An "informal request" clearly encompasses an "oral claim". Therefore, the Panel's determination that 38 C.F.R. § 3.155(a) only contemplates a written application is legally incorrect in light of § 3.155(c). As such, the Appellant respectfully requests that the Panel grant the petition for rehearing or, in the alternative that the Court, *en banc*, grant this petition for rehearing in order to interpret 38 C.F.R. § 3.155(a) in light of 38 C.F.R. § 3.155(c) and the arguments raised by the Appellant herein.

Second, the Panel, in interpreting 38 C.F.R. § 3.155(a) failed to employ the mandatory canons of statutory construction that apply uniquely to veteran benefits law. In *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the United States Supreme Court was asked to interpret 38 U.S.C. § 2024(d), a provision of the Veteran's Reemployment Rights Act that provides reemployment rights to service personnel. The petitioner's employer argued that the statute must be interpreted to provide reemployment rights after reasonable tours of duty, but not for a period of three years as contemplated by the petitioner.

In interpreting the statute, the Court first held that the statute was completely silent as to any durational limits to be placed on the protection it provided. *Id.* at

218. The Court further held that the employer's interpretation of the statute, as based upon language contained in other provisions of the statute would not be granted any interpretive significance in light of the canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favors." 502 U.S. 220, at f.n. 9. Accordingly, the Court held that the statute placed no durational limits on the petitioner's reemployment rights.

The Court clearly held that veteran benefits statutes are to be construed in the veteran's favor. Meaning, that a reviewing court, when faced with an interpretation of the law at issue that favors the veteran versus an interpretation that favors the government, the interpretation that favors the veteran must prevail.

This holding is clearly in keeping with the purpose behind the veteran benefits laws which were created to benefit the veteran. The Federal Circuit, itself has recognized that the veteran benefits statutes are "strongly and uniquely pro-claimant. *See, Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). Further, in enacting the laws regarding veteran benefits entitlement, Congress created a *sui generis* scheme for "awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

The Court's holding in *King* is clearly in keeping with the purpose of the veteran benefits laws. Meaning, that if the purpose of the veteran benefits laws is to **benefit** the veteran, then it naturally follows that such laws should

always be construed in the light most favorable to the veteran's favor.

The Court's mandatory canon of construction was again recognized in *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving statutory interpretation of a disability benefits provision. The government, in denying benefits to a veteran asserted that 38 U.S.C. § 1151 imposed a fault requirement on the government in order for it to be liable for benefits. The Court first held that the statute's plain language contained absolutely no mention of a fault requirement, and that the government's implicit interpretations of a fault requirement could therefore only be entertained under the guise of ambiguity. The Court, citing *King*, concluded that even then, such an argument would not prevail because such an ambiguity would have to be resolved in the veteran's favor.

Reading *Gardner* and *King* in conjunction reveals that there is no ambiguity requirements in either of the Court's holdings. In *Gardner*, the Court merely held that even if the government could prove the existence of an ambiguity in the statute, the government's interpretation of the statute would not prevail since the statute must be construed in the veteran's favor. In *King*, the Court quite simply held that veteran benefits statutes are to be construed in the veteran's favor. As such, when faced with two conflicting interpretations of a veteran benefits statute, the Court is required to choose the interpretation which favors the veteran and promotes the fundamental purpose of the veterans benefits adjudication scheme.

In the present case, the Panel was asked to interpret 38 C.F.R. § 3.155(a) which contained no explicit language

requiring a "written" application. The Appellant claimed that the regulation's use of the word "any" established that such a communication could be oral. Clearly such an interpretation favored the veteran.

The Panel failed to employ the mandatory canons of construction that apply uniquely to veteran benefits statutes and instead construed the regulation against all veteran's favor and in the government's favor by adopting their definition. As such, the Appellant, as well as all veterans, were denied the benefit of the United States Supreme Court's only two cases regarding construction of veteran benefits statutes, as well as the proclaimant nature of the veteran benefits adjudication system. Therefore, the Appellant respectfully requests that the Panel grant the petition for rehearing or, in the alternative that the Court, *en banc*, grant this petition for rehearing in order to interpret 38 C.F.R. § 3.155(a) in light of the mandatory canons of construction that apply uniquely to veteran benefits laws.

Finally, the Appellant claims that in light of the Federal Circuit's recent holding in *Hayre v. West*, that the Panel's determination that a breach of the VA's duty to assist imposes no enforceable legal obligation upon the Secretary is erroneous.

In the case below, the Appellant argued that pursuant to both 38 U.S.C. § 5102 and 38 C.F.R. § 3.150(a), the VA was required to provide her an application for benefits once she made a request for benefits in writing. Although both the Government and the Panel concede that the VA did breach this duty to assist, both conclude that neither provision prescribes any remedy for the

breach and as such impose no enforceable legal obligation upon the Secretary.

However, it is Appellant's contention that in light of *Hayre v. West*, the breach of such a duty constitutes a fundamental procedural error that the Secretary is **required** to remedy and until the Secretary fulfills such a duty, the challenged rating decision remains non-final. The Panel's holding herein conflicts with *Hayre* by concluding that in certain circumstances in which mandatory duties are owed by the VA to the claimant are required and others may be ignored by the Agency. However, as both 38 U.S.C. § 5102 and 38 C.F.R. § 3.150 provide, the VA ***"will"*** provide an application form if such a request is made in person. The use of the term ***"will"*** indicates that such a statutory duty is mandatory not discretionary. As such, in the present context, the VA's affirmative duty is mandatory and thus becomes the type of duty recognized in *Hayre*, that the government is saddled with, as in the duty to assist the claimant. The government's failure to fulfill such a mandatory duty effectively prevents the claimant from receiving the type of adjudication contemplated by Congress of a veteran's claim.

This Court recently recognized that such Congressional mandates are required to be performed by the VA in order to operate the unique system of processing and adjudicating claims that is both claimant friendly and non-adversarial. *Hayre v. West*, ___ F.3d ___, No. 98-7046, p. 4 (August 16, 1999). 38 U.S.C. § 5102 and 38 C.F.R. § 3.150(a), which both provide that upon request made "in person or in writing by any person applying for benefits" the appropriate application with instructions ***shall be*** furnished, is clearly encompassed within the

VA's mandatory duties and represents a reasoned extension of the principles of the duty to assist.

In *Hayre*, the Court held that a breach of the duty to assist constituted "grave procedural error". *Hayre v. West*, ___ F.3d ___, No. 98-7046, p. 10. The Court further held that in cases of grave procedural error, a RO or BVA decision is not final for purposes of a direct appeal. *Id.* at 9. The Court reasoned that the breach of the duty to assist places "the interests of the veteran, in this uniquely pro-claimant adjudicatory system, in considerable jeopardy in that it effectively extinguishes the claimant's right to judicial review. *Id.* at 10. In the present case, the duty to assist was the VA's obligation to furnish Ms. Rodriguez with an application. The Regional Office's acknowledged refusal to furnish her with an application constituted a breach of the VA's statutory and regulatory duty to assist and resulted in the denial of an adjudication of Ms. Rodriguez' claim for reopening of her previously denied claim, when Ms. Rodriguez requested an application in person in March 1987 and was not provided with an application.

Further, in stressing the importance of the duty to assist, the *Hayre* Court recognized that "[i]f a veteran, who is later able to obtain counsel or serendipitously discovers a breach of the duty to assist, has no remedy, then the duty to assist becomes a hollow obligation." *Id.* at p. 13. The Court then concluded that CAVC caselaw established that breaches of the duty to assist requires remand to permit the RO the "opportunity to make a reasonable attempt to fulfill the duty to assist, that is, to gather the relevant evidence and documents, to consider the governing statutes, regulations and case law and to

perform a critical examination of the justification for the decision." *Id.* at pp. 13-14. The Court further concluded that according to CAVC caselaw, "following the fulfillment of the duty to assist, the case is reviewed to determine whether the additional evidence, together with the evidence that was previously of record, supports the allowance of all benefits sought on appeal." *Id.*

As such, the Court remanded the case to the CAVC for a determination of whether the statutory duty to assist had been breached by the VA. The Court directed that if the CAVC found that a breach had occurred, then the CAVC would be required to remand the case to permit the VA an opportunity to fulfill its duty to assist. *Id.* at 14-15.

Similarly, in the present case, the Appellant claims that the VA breached a fundamental and mandatory duty to assist by failing to provide her with an application for benefits once she made such a request in person. While both the CAVC and the Panel acknowledged that such a breach occurred both concluded that the Appellant was without a remedy. Such a determination contradicts this Court's holding in *Hayre* as well as Congress' expectations upon the Agency.

Pursuant to *Hayre*, when the Appellant claims that the VA has breached a mandatory statutory duty, such as encompassed with the Agency's duty to assist, the CAVC is **required** to first determine whether such a breach occurred, and upon such a finding, remand the case back to the Secretary for a fulfillment of that duty. The CAVC has not been afforded this opportunity to review the entire record of proceedings below in order to ascertain

whether in fact a breach of a mandatory duty occurred. Both the CAVC and Panel's determination that a breach of the Secretary's statutory duty to assist imposes no enforceable legal obligation upon the Secretary undermines the *sui generis* nature of the veterans benefits scheme.

Therefore, the Appellant respectfully requests that the Panel grant the petition for rehearing or, in the alternative that the Court, *en banc*, grant this petition for rehearing in order to determine that because the Secretary breached its statutory and regulatory duty to provide Appellant with an application, the CAVC's decision must be vacated and remanded to the BVA for a readjudication on the issue of entitlement to an earlier effective date predicated upon a concession that the reopening of the claim would have taken place in March 1987, the date Ms. Rodriguez made her first oral request for an application to reopen her claim for benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and

two copies to the below named counsel for Appellee on the 4th day of October, 1999, addressed to:

Todd M. Hughes
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/s/ Kenneth M. Carpenter
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